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Supreme Court of the United States

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OCTOBER TERM, A.D., 1957.

No. 973

JOHN B. SCHLOSSER,

Petitioner,

vs.

COMMONWEALTH EDISON COMPANY, WILLIS GALE, JOHN W. EVERS, JR., SOLOMON A. SMITH and H. P. SEDWICK,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

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Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

John B. Schlosser prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit affirming the judgment of the U.S. District Court for the Northern District of Illinois, Eastern Division and refusing to issue a Writ of Mandamus or grant other relief he specifically sought in the said Court of Appeals.

OPINIONS BELOW.

The opinion of the District Court is set forth at p. 7a herein, at p. 116 of the original Record, and the opinion of the Court of Appeals is to be found in 250 F. 2d 478 and p. 1a herein.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 2, 1958 and on March 31, 1958, Mr. Justice Clark extended the time for filing of this petition until May 2, 1958. The jurisdiction of this Court is invoked under 28 U.S.C.—1254 (1).

STATUTES INVOLVED.

The issues here involved, the interpretation of 28 U.S.C. Sec. 1651 and also Rules 15 (a); 52 (a); 62 (g); and 65 (b) and also the discovery rules of the Rules of Civil Procedure.

QUESTIONS PRESENTED.

1. Whether petitioner was receiving a prompt and fair trial in the District Court?

2. Whether the Court of Appeals possesses authority and was under a duty to direct the District Court to conduct the proceedings in order to assure petitioner a fair and prompt trial?

3. Whether the Court of Appeals erred in failing to grant petitioner any of the relief prayed for in his motion for Hearing, Interlocutory Injunction, and Writ of Mandamus or in holding such an injunction could not properly issue?

4. Whether Rule 52 (a) required the District Court to make specific findings of fact and conclusions of law in its memorandum of August 9, 1957 rejecting plaintiff's motion for a preliminary injunction?

5. Whether the District Court disregarded Rule 65 for the following reasons:

   a. Whether it was under a duty to set his motion for hearing?
   b. Whether it requires that petitioner be given an opportunity to present oral testimony or to argue the merits of his motion?

6. Whether such decisions conflict with applicable decisions of this Court?

7. Whether this Court should exercise its power of supervision?

STATEMENT.

This is a petition for a writ of Certiorari seeking review of the final judgment of the Court of Appeals of January 2, 1958, (1) affirming an order of the District Court denying plaintiff's motion for an interlocutory injunction without a hearing; (2) refusing to grant petitioner any relief pursuant to a Motion for Hearing, Interlocutory Injunction or Writ of Mandamus filed in the Court of Appeals on October 14, 1957, or its Supplementary Motion on December 10, 1957 asking that it direct the District Court to assure plaintiff a fair and prompt trial or to grant him other relief prayed for in such motion.

On April 30, 1957, petitioner, a resident of the State of California, filed his Complaint seeking to compel defendants to pay him a service annuity under the terms of the Commonwealth Edison Company Annuity Plan (hereinafter referred to as Edison). Petitioner had been employed by Edison for a total of 29 years and for the eight years prior to termination of his employment, he alleged he had suffered varying degrees of coronary and angina heart disease. Petitioner was compelled to resign on or about September 1, 1954 under threat of discharge if he did not resume his duties.

Petitioner's action was instituted as a beneficiary of Edison's annuity trust. This annuity was, of course, his deferred wages.

The principal aspects of the Edison Plan are (R. 12, 13):

(a) Payment of a Service Annuity to all employees attaining the age of 65 (Sec. 4, 1st par.).

(b) Payment of annuities to employees reaching the age of 60 under certain conditions (Sec. 4, 2nd par.).

(c) Payment of annuities on account of permanent disability and for any other reason in the third paragraph of Section 4, which provides as follows:

> "Any employee who shall not have attained the age of 65 while in service may, in the discretion of the Board and upon recommendation of the Committee, be retired, on account of permanent disability or for any other reason and without regard to age or period of credited service, with a service annuity in an annual amount computed in accordance with the provisions of Section 5 (b)."

(d) Payment of service annuities by trustees of Annuity Fund only upon certification by majority of Service Annuity Committee. (Sec. 1, Trust Agreement).

(e) Administration of the Service Annuity System by Service Annuity Committee (hereinafter referred to as Committee) and the Edison Board of Directors who also select the members of such Committee.

Petitioner, whose loyal and efficient service was conceded, was promoted to be an equipment expediter in 1951 and was engaged in such duties in 1954 when advised by his doctor that continuation in his work might unduly endanger his health.

Petitioner then requested that he be allowed to retire with an annuity under the said Plan (Section 4, par. 3). Such annuity, if any, was payable only during the remaining lifetime of an employee. Though entitled to a determination under the plan as to his right to a service annuity by the Edison Service Annuity Committee, he was denied a hearing by the Committee, the Committee never acted on his request and Edison rejected his request for an annuity.

Petitioner claimed the annuity plan is part of a comprehensive trust agreement and plaintiff was a beneficiary of such agreements. (Par. 9, Complaint) (R. 12) Plaintiff, by his complaint as amended, also sought (by Count II) the construction of various provisions in the plan which are vague or indefinite and fail to provide proper and reasonable standards for the determination of his legal rights (R. 19). Plaintiff seeks such construction of the above paragraph of Section 4 as well as Section 8 which provides that a service annuity shall cease upon bankruptcy, upon the entry of a judgment, and in case of any misconduct on the part of an annuitant and Section 9 insofar as it authorizes the secretary of the committee to require satisfactory evidence that each annuitant is still entitled to a service annuity, such provisions are claimed to be arbitrary, illegal and void.

Edison claimed it was justified in refusing to grant him a service annuity under the following rule:

> *"In 1954 or at present a person is entitled to disability retirement only by virtue of competent doctors stating that an employee is unable to perform any services."*
>
> (Letter of C. E. Parker, Manager of Industrial Relations, Commonwealth Edison Co. to plaintiff October 3, 1956. (Italics added) (Par. 16, Complaint) (R. 14)

However, petitioner was given notice of this rule for the first time two years after his retirement.

Petitioner filed a motion for a preliminary injunction on May 24, 1957. (R. 7-9) Petitioner's motion incorporated as part thereof his original complaint as amended.

The District Judge (Win J. Knoch) on March 24, 1957 took under advisement plaintiff's motion that his motion for preliminary injunction be set for hearing. More than

2 months later without according the plaintiff a hearing, the Court on July 30, 1957, denied the motion on the merits at the very time plaintiff was in court seeking a hearing on his motion. This ruling was confirmed on August 9, 1957 by the Court's memorandum order.

Petitioner was also denied an opportunity to argue the merits of his motion and only after the Court announced its decision on the merits, did the court allow him an opportunity to file a memorandum as to his right to present oral testimony.

On May 24, 1957, plaintiff requested that his motion be set for hearing and the following took place in Court: (R. 35)

> "The Court: We will hear this matter on briefs, if you will both get in your briefs—
>
> Mr. Booth: No. I am entitled to a trial, if the Court please, under the decision of the Federal Courts, and I want this motion for a preliminary injunction set down for hearing. I am entitled to a hearing and a trial in Court.
>
> The Court: I am going to give you twenty days, and when your pleadings are filed, I will consider the matter of a date for hearing.
>
> Mr. Booth: We can't get a date today, if the Court please?
>
> The Court: I can't give you a date today, no."

On the same date the Court entered the following order: (R. 21)

> "This day come the parties by their attorneys and the plaintiff presents his motion for preliminary injunction which motion is entered and it is
>
> Ordered that the defendant be and is hereby given 20 days to answer said motion and it is
>
> Further Ordered that the plaintiff's motion to set this cause for hearing on his motion for preliminary injunction be entered and said motion is taken under advisement by the Court."

On June 10, 1957 the following took place in open Court. (R. 73, 74)

> Mr. Ming: (attorney for defendants): It then will be unnecessary to set the motion for temporary injunction. Instead the Court will have before it our motion to strike the petition for temporary injunction, raising the issue."
>
> Mr. Booth: Well the problem is that the defendants have been given a very long time * * * to file a pleading to a motion for a temporary injunction. The question still is as to whether or not the Court will grant the Plaintiff a hearing on a motion for a temporary and preliminary injunction as prayed for in his motion."

On the same day the Court entered the following order in part:

> "Further Ordered that leave be and it hereby is given to the defendants to file by June 17, 1957 their motion to strike plaintiff's petition for a preliminary injunction and said motion is hereby taken under advisement by the Court on the briefs of counsel, supporting brief to be filed within 5 days from this date and answering brief within 5 days thereafter." (R. 42)

Respondents, though they represented to the District Court that it was their intention to file a motion to strike, filed no such motion, but on the contrary on June 17, 1957 filed a 2-page answer to plaintiff's motion for preliminary injunction.

On July 30, 1957 plaintiff's motion for a hearing on his motion for preliminary injunction again came before the District Court. The transcript discloses that the trial Court then denied the motion for preliminary injunction on its merits even though the Court had, over sixty days earlier, advised the parties in open court that it would take under advisement plaintiff's motion for a hearing on such motion. No ruling up to that time had taken place and no opportunity to argue the motion or any other hearing

had then been allowed other than for formal presentation of the motions at issue.

The transcript of proceedings of such date shows the following: (R. 99, 100, 101)

> "Mr. Booth: • • • The question there is, is the court going to allow the plaintiff a hearing on his motion for temporary injunction and will the Court now fix a date for it? That is the first one.
>
> I have, since May 24th, repeatedly asked the Court to fix a time for a hearing on it, and if the Court would fix a date some afternoon next week, or earlier, it would be satisfactory to me, but I am not asking that it be heard at this moment because I want a few days notice. That is the first matter." • • •
>
> Mr. Booth: Well, the question is, we are as a matter of law clearly entitled to a hearing on our motion for temporary injunction. The defendants said they would file a motion to strike. The Court on June 10, 1957—I have the Court order here—gave them permission to file a motion to strike. They decided not to, and they filed an answer, and the Court in that order of June 10th said that it would take motion under advisement if the defendants filed a motion to strike and briefs were filed, so I ask that the Court, at its earliest convenience, no later than some day next week, fix a date for hearing on that motion.
>
> The Court: Well, *I have gone into this matter, gentlemen, and I have decided that the motion for preliminary injunction should be denied.*" (italics added) (R. 101)

After petitioner perfected his appeal in the Court of Appeals he on October 14, 1957 filed a Motion for Hearing, Preliminary Injunction or in the alternative for a Writ of Mandamus and a typewritten brief in support of such motion which also argued the merits of the appeal. The defendants filed a printed brief in brief in opposition thereto and plaintiff filed reply brief.

The Court then set the motion for oral argument, but the parties agreed the argument would cover both the Motion and the merits of the Appeal. The Court is partly in error when it said "no appendix or brief was filed." True, no appendix was filed but typewritten briefs were filed covering all issues upon which petitioner now contends the Court of Appeals and the District Court committed error. In fact, the Court subsequently states on the same page "after submission of briefs" but implies they related only to the Motion which is incorrect. The defendants' brief likewise requested the Court of Appeals "to dispose of both plaintiff's motion and appeal." (p. 9)

REASONS FOR ALLOWANCE OF WRIT.

I.

Petitioner's inability to secure a fair and prompt trial in the Trial Court required the Court of Appeals to take corrective action by mandamus.

Petitioner was denied a fair trial in the District Court below, and the facts were clear to the Court of Appeals. It was the duty of the Court, in the interest of prompt and efficient administration of justice, to open—not close—its eyes to the right of plaintiff to secure a fair and prompt trial.

This is what the Appeals Court did when it said "We see no reason to discuss other points argued by plaintiff. Even so, we perhaps should mention plaintiff's criticism of Judge Knoch. We think it is without merit."

The facts as set forth in the motion seeking a writ of mandamus and other relief filed with the Court of Appeals on October 14, 1957 and the motion submitted to it on December 4, 1957 follow:

1. The District Judge (Win J. Knoch) took under advisement for a period of over two months, plaintiff's motion that his motion for temporary injunction be set for hearing and without according plaintiff a hearing on July 30, 1957, denied the motion on the merits at the very time plaintiff was in court praying for a hearing on his motion. This ruling was confirmed on August 9, 1957, in open court.

2. Petitioner was denied an opportunity to argue the merits of his motion and only after the court announced its decision on the merits (R. 101), did the court allow him an opportunity to file a memorandum as to his right to present oral testimony.

In *Wilson* v. *Federal Communications Commission*, 170 F. 2nd, 793, 802 the Court said:

> "An essential element of due process is an opportunity to be heard before the reaching of a judgment. By due process of law is meant 'a law, which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial * * * ' and as said in *Galpin* v. *Page* (U.S. 1873) 18 Wall 350, 365, 21 Law Ed. 959 'Judgment without such citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression and can never be upheld where justice is justly administered.'"

The District Court failed to comply with this principle.

3. Petitioner filed amendments to his Amended Complaint on July 24, 1957 though they were the first amendments of substance to Count I and the first amendments of Count II. (1) The defendants objected to these amendments and the Court held up action upon them for over 4 months.

4. Petitioner, on July 16, 1957, filed his first set of interrogatories consisting of 38 questions and various subquestions. (R. 84ff) The defendants objected to each and every interrogatory (R. 93) and the District Court, as of the time of argument (December 4, 1957) had not yet ruled on these objections.

5. Petitioner since June 10, 1957, has been denied all forms of discovery including subpoena or other access to Edison records disclosing the meaning or application of

---

(1) It was only when defendants withdrew their objections on December 11, 1957 that the Court allowed them to stand. See certified copy of docket entries in District Court filed with Motion for Extension of Time to File Petition for Certiorari.

the term, "*permanent disability or for any other reason,*" contained in the third paragraph of Section 4 upon which petitioner claims an annuity.

6. The defendants, on September 13, 1957, filed a motion for summary judgment consisting of documentary material in excess of 100 pages, much of which was not under oath. Said documents disclosed that the defendants' medical determination that the plaintiff did not come within the said Section 4 was based upon information supplied by Edison employees that plaintiff had a desk job, but other Edison employees in the same pleading stated, under oath, that his duties consisted of that of an equipment expediter involving trips to various plants in connection with the delivery of millions of dollars of equipment.

7. Plaintiff, on September 10, 1957, filed notice to take the depositions of one of the defendant's doctors and two directors. (R. 119) The District Court, on September 13, 1957, (R. 121) upon defendants' request immediately stayed all discovery of each and other kind pending ruling on plaintiff's request that he be allowed such discovery in order that he might be able to secure relevant facts in the possession of defendants, their employees or their reports upon which he could file counter affidavits to defendants' motion for summary judgment. (*)

(*) On March 7, 1958, the Executive Committee of the District Court assigned this cause to Honorable Julius Miner who then was sworn in as a member of the District Court. On March 27, 1958, during the preliminary call of some of the numerous cases transferred to him, he did set for hearing on June 9, 1958, the various pending motions relating to discovery, etc., and which had not been disposed of by Judge Knoch, and stated that he was unable to grant petitioner's request that such matters be considered on an earlier date.

The relief sought in the Court of Appeals was of course not limited to a demand that the District judge be directed to return the case to the Executive Committee for reassignment. The supplementary motion submitted on December 4, 1957 requested that the Court of Appeals direct that "all motions now pending in the District Court and upon which all parties have been heard be disposed of with dispatch." It also requested further action consistent with the proper administration of justice. The Court of Appeals was therefore under a duty to act in view of the fact that at the time of the oral argument it appeared beyond dispute that plaintiff had not been allowed to amend his pleadings or that any order had been entered within 4½ months of filing, that no action had been taken on plaintiff's first interrogatories though filed on July 16th or 4½ months earlier, that other discovery demands likewise had not been acted upon by the District Court for several months and that all discovery had been stayed on September 13th pending action on plaintiff's request that he be allowed discovery in order to meet defendants' 100 page motion for a summary judgment.

The Court of Appeals not only failed to take note of this situation, but also said there was no basis for plaintiff's criticism of the District Judge, though he was clearly entitled to prompt action by the District Judge on all pending matters. It was the opinion of the Court of Appeals that contributed to the present situation which leaves unacted upon discovery demands for a period of 7 to 9 months. (1) The proper function of the Court of Appeals where the District Court permits undue delay

(1) See certified copy of docket entries in District Court filed with Motion for Extension of Time to File Petition for Certiorari.

was set forth in *The Plow City*, 122 F. 2d 816, 819 (C.A. 3rd) where the Court said:

> "The responsibility for the delays, and postponements must therefore rest with the trial judge. To conduct in this desultory manner over a period of nine months a trial which ought not to have consumed ten days is an abuse of judicial discretion on the part of the trial court, which this court cannot overlook."

In *Hallman* v. *U.S.*, 182, F. 2nd 880, 885, the court said:

> "A trial court has the duty of safeguarding the rights of all parties before it."

It should have been clear to the Court of Appeals that the trial court was not conducting this proceeding consistent with its high duty and it was the Court of Appeals' responsibility to take appropriate action to assure plaintiff a fair and prompt trial.

Since the Court of Appeals had jurisdiction on appeal, it had jurisdiction to issue a writ of mandamus. *Roche* v. *Evaporated Milk Association*, 319 U.S. 19, 25. That very Court as has this Court affirmed the power to issue writs of mandamus even where a district court abuses its discretionary power under the federal rules. *La Buy* v. *Howes Leather Company, Inc., et al.*, 352 U.S. 249, 226 F. 2nd, 703.

There the Court of Appeals held that (p. 706) the question is are the orders "beyond the Court's power under the pertinent rule" and whether they conform to the Rule. The trial Court was surely shown to have abused its power in failing to grant a hearing under rule 65 (b) in that it allowed no hearing whatsoever on the motion for preliminary injunction including an opportunity to argue the merits of the motion, not to say the right to present oral testimony. It likewise failed to conform to Rule 15 (a) which provides that leave to amend shall be freely given,

though the motion to amend had been before him approximately 4½ months.

It also failed to conform to the spirit of the discovery rules when it failed to act on interrogatories and stayed the deposition request for a period of several months. The purpose of the rules was to aid parties in more expeditiously securing a trial, not to enable one party or a court to unnecessarily delay a case and deprive American citizens of their fundamental procedural rights

II.

The Court of Appeals sanctioned a departure by the lower courts of the proper and usual course of the conduct of the case requiring the exercise of this court's supervision.

This Court in *Mesarosh* v. *U. S.*, 352 U.S. 1, 14 has reaffirmed its supervisory functions to assure the proper administration of justice in the federal courts. It has declared

> "the untainted administration of justice is certainly one of the most cherished aspects of our institution. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See *McNabb* v. *U.S.*, 318, U.S. 332. Therefore fastidious regard for the honor of the administration of justice requires the court to make certain that the doing of justice be made so manifest that the only irrational or perverse claims of its disregard can be asserted."

This principle is of course equally applicable to civil as well as criminal suits. In the field of civil proceedings it is the distinct function of district courts to demonstrate that between employees of large utility corporations and the corporation itself there is an even handed and firm administration of the trial so as to leave no doubt

but both are accorded the same standards of justice. Here however, the refusal of the court to act upon the various motions for discovery made by the plaintiff or to give him a fair and prompt hearing served only to oppress and discriminate against the plaintiff to the unfair advantage of respondents.

It was the dilatory tactics of the defendants approved by the District Court that paved the way for the present condition where the District Court has not for a period of many months acted upon simple discovery matters which should have been disposed of within a period of two to three weeks. The Court of Appeals failed to perform its duty by condoning the conduct of the trial Court.

III.

The District Court's order of August 9th, 1957 violates Rule 52 (a).

The Trial Court's single page memorandum of August 9th denying plaintiff's motion for preliminary injunction (R. 116) contains no findings of fact unless its final conclusion denying any kind of a hearing is to be taken as one. Thus, notwithstanding the plain and simple mandate of Rule 52 (a) imposing this duty upon him, he failed to comply with it as he did with other controlling principles. This Court has held that it is of the highest importance to a proper review of the action of a District Court in granting or refusing a preliminary injunction that such findings be made. *Mayo* v. *Lakeland Highlands*, 309 U.S. 310. This is the rule in all federal courts including the 7th Circuit, but not applied in this case.

The memorandum filed by the Court is clearly not that kind of an opinion within Rule 52 (a). This very Appeals Court in *Bank of Madison* v. *Graber*, 158 F. 2d 137, 141, citing with approval *U. S.* v. *Causby et al.*, 66 Supreme

Court 1062, 1069 held that findings must be made on every material issue in granting or denying a motion for a preliminary injunction.

Petitioner did argue this issue in the Court of Appeals. The brief he filed expressly relies upon the above cases. The Court of Appeals apparently ignored this issue even though its earlier rulings disclose a positive adherence to the rule. In *Shannon* v. *Retail Clerks*, 128 F. 2d 553, 555 the Court in referring to Rule 52 (a) and 65 (d) said:

> "These are strongly worded mandatory provisions which should be respected. They are not meaningless words • • • if, however, it is assailed on appeal [the absence of findings] it should be set aside because a failure to respect and comply with the rules."

And in *Brown* v. *Quinlan*, 138 F. 2d 228 this same court held that findings are necessary in denying as well as granting a motion for preliminary injunction. The Court also held that ultimate findings without subordinate findings do not constitute compliance with the rule. See also *Dearborn Nat. Gas Co.* v. *Cons. Pet. Co.*, 164 F. 2d 332, 333 relying on *Kelley* v. *Everglades Dr. Dt.*, 319 U.S. 415, 420.

It is apparent from the order of the Court that it lacks even any semblance of compliance with the rule. The Court said "Scrutiny of all the pleadings, in the light of the arguments, fails to disclose allegations which, although viewed in the light most favorable to plaintiff, are sufficient to warrant issuance of a preliminary injunction." However, it failed to state what the pleadings were, what allegations were contained in the pleadings or why they were insufficient. In fact, only the conclusion appears with no findings supporting it whatsoever.

IV.

The Appeals Court erroneously concluded no hearing on plaintiff's motion in the Trial Court was required and that the federal courts could not issue a mandatory preliminary injunction.

The Court of Appeals excused the District Court from holding a hearing of any kind and from making findings in its order by relying upon the proposition of *South State Street Building Corp.*, 140 F. 2nd 363, where the Court held:

> "the denial of a temporary injunction, based on a verified complaint alone was certainly no abuse of discretion, where the complaint did not state a cause of action or any facts showing irreparable injury."

The Appeals Court said no irreparable damages could be established because the payment of the pension before trial on the merits would not maintain the status quo but produce the opposite result. It is the very nature of plaintiff's contract with defendants and their actions preventing him from securing a prompt and fair trial which adds to the grave irreparable injury requiring prompt judicial action. The defendants can, of course, be fully protected by a bond.

The defendants by their own conduct destroyed his ability to obtain an effective remedy at law. In the trial court they utilized every technical device known to them to prevent petitioner from securing a fair or prompt hearing. Perhaps they believed their financial and other resources, in which they were heavily superior, could force petitioner to drop his efforts to secure a pension. Their policy deprived him of a hearing before Edison's Annuity Committee. Two years after he retired he first learned of the principle governing the granting of annuities under Sec. 4, par. 3. No published records or reports ever set forth this principle.

It is his contract which establishes his right to an annuity regardless of age or duration of employment under the third paragraph of Section 4 which provides for retirement "on account of permanent disability or for any other reason". It is the condition of the status quo which produces the irreparable injury for his annuity is to be payable during his lifetime. Time is of the essence in this case. Under these circumstances, the Courts may grant preliminary mandatory injunctions.

Former President Taft, while a Circuit Judge, recognized this principle when he said:

> "The office of a preliminary injunction is to preserve the status quo until, upon final hearing, the court may grant full relief. Generally this can be accomplished by an injunction prohibitory in form, but it sometimes happens that the status quo is a condition not of rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury upon complainant, which he appeals to a court of equity to protect him from. In such a case, courts of equity issue mandatory writs before the case is heard on its merits." *Toledo, A.A. & N.M. Ry. Co.* v. *Pennsylvania Co.*, (CC ND Ohio 1893) 54 F. 730, 741, 19 LRA 387. This principle was approved in *Scholz* v. *Barbee*, 344 Ill. App. 630, 638.

The Court of Appeals erroneously assumed that federal law does not permit the granting of mandatory preliminary injunctive relief. Plaintiff's motion for interlocutory relief in that Court was predicated on both 28 U.S.C., Sec. 1651 and Rule 62 (g) of the Rules of Civil Procedure. The rule does not limit the power of the appellate courts to grant any type of injunctive writ for it says that such courts have power "to grant any injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo".

Moreover, petitioner brought this suit as a beneficiary of an annuity plan which was part of a comprehensive trust agreement in which he was seeking not merely the recovery of his own annuity but the construction of indefinite, vague and arbitrary provisions of the annuity plan, one of which was the 3rd paragraph of Section 4. Mandatory preliminary injunctions are issuable where as here a complainant alleges that the acts of the defendants were wilful or fraudulent. *Trautwein* v. *Moreno*, 22 F. 2d 374. A Court of Appeals recently reversed a trial court for failure to issue a mandatory preliminary injunction where the denial of the writ meant the continuation of the deprivation of basic human rights. *Clemons* v. *Board of Education of Hillsboro*, 228 F. 2d 853, 857. That court relied upon Pomeroy: Equity Jurisprudence, Vol. 4, 5th Ed., 934, 935, where the author said:

> "The incompleteness and inadequacy of the legal remedy is the criterion which, under the settled doctrine, determines the right to the equitable remedy of injunction."

The court also said:

> "The same test was established by the Supreme Court in *Sterling* v. *Constantine*, 287 U.S. 378, 403, 53 S. Ct. 190, 197, 77 L. Ed. 375, wherein the Supreme Court said:
>
> > 'Whether or not the injured party is entitled to an injunction will depend upon equitable principles; upon the nature of the right invaded and the adequacy of the remedy at law.'

The Appeals Court also overlooked the prevailing rule of the federal courts that it is not necessary that plaintiff's right to a final decision be absolutely certain and that very court approved the following principle laid down by the Second Circuit in *Hamilton Watch Company* v. *Benrus*, 206 F. 2nd 738, 740, where that court said:

> "It is not necessary that the plaintiff's right to a final decision, after a trial be absolutely certain, wholly without doubt; if other elements are present, (i.e. the balance of hardships tips decidedly towards plaintiff). It will ordinarily be enough that the plaintiff has raised serious questions going to the merits, so serious, substantially difficult and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." Approved in *Mutinger* v. *Numanich Lab. Co.*, 215 F. 2d 382, 385.

Surely in this case the denial of a mandatory preliminary injunction works enormously against the plaintiff. The defendants can be protected by a bond. And it is their acts which have created the condition of irreparable injury the continuation of which is assured by their conduct and the denial of the relief sought by petitioner. The annuity represents the balance of his compensation held back by the defendants until retirement, is payable, if at all, during his remaining lifetime, not afterwards.

In the following three cases Courts of Appeals have set aside a district court order for failure to allow parties to present oral testimony on a motion for a preliminary injunction:

> *Sims* v. *Greene*, 161 F. 2d 87, 88, 89;
> *City Line Center* v. *Loews*, 178 F. 2d 267;
> *Ford Motor Co.* v. *Cottingham*, 228 F. 2d 911.

In the *City Line* case the Court said, reversing a District Court order which failed to provide for a hearing:

> "At the hearing the District Judge determined no testimony should be offered and denied the Motion * * * It is obvious appellants were not allowed the hearing contemplated by Rule 65 (a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., *Sims* v. *Greene*, 161 F. 2d 87."

Upon the basis of the above authority it is clear that the District Court abused its discretion in not granting a hearing to the plaintiff on his motion for a preliminary injunction and that its denial constitutes a violation of his rights under the Federal Rules.

CONCLUSION.

Petitioner has shown that the trial Court and the Court of Appeals have departed from important principles of trial procedure long approved by this Court and other federal courts. He has been deprived of a fair and prompt trial because of the failure to properly apply the discovery rules, Rules 15 (a), 65 and 62 (g). Rule 52 (a) was also ignored. This is indeed an appropriate case for the exercise of this Court's supervisory powers over subordinate federal courts.

Respectfully submitted,

Harry R. Booth

HARRY R. BOOTH,

Attorney for Petitioner,
John B. Schlosser.

APPENDIX A.

In The

UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 12145 SEPTEMBER TERM AND SESSION, 1957

JOHN B. SCHLOSSER,

Plaintiff-Appellant,

vs.

COMMONWEALTH EDISON COMPANY ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 2, 1958

Before DUFFY, *Chief Judge*, MAJOR and HASTINGS, *Circuit Judges*.

MAJOR, *Circuit Judge*. Plaintiff, a retired employee of defendant (defendant refers to the corporate defendant), commenced an action in the District Court for the recovery of money alleged to be due and owing under a service annuity plan in effect at and prior to the time of his retirement. It was alleged that plaintiff under said plan was entitled to monthly service annuity payments in the amount of $137.77, from the date of his retirement and during the remainder of his life. Later, plaintiff filed an additional count purporting to be a class action which

sought an interpretation, modification and alteration of defendant's service annuity plan. Plaintiff demanded a trial by jury. Defendant answered the complaint and, among other things, requested its dismissal for failure to state a claim upon which relief could be granted. This action is at present pending in the District Court.

On May 20, 1957, after proper notice to defendant, plaintiff filed in the District Court his motion for a preliminary injunction. Attached thereto and made a part thereof were copies of the complaint and defendant's service annuity plan. The motion includes the allegation:

> "Plaintiff has instituted this proceeding for the purpose of compelling the defendants to pay him such additional compensation or Service Annuity as required by the third paragraph of Section 4 of said Service Annuity System which annuity the defendants have arbitrarily and unlawfully denied him."

The motion concludes:

> "Plaintiff has suffered and will continue to suffer great and irreparable damage unless this Court forthwith enters an interlocutory decree or decrees requiring the defendant to promptly pay him a Service Annuity of not less than $137.77 per month as prayed for in said Complaint.
>
> "Now, Therefore, plaintiff prays that this Court grant him an immediate hearing and enter a decree or decrees as prayed for herein."

Defendant filed its answer, in which it alleged, among other things, "The plaintiff does not set forth sufficient grounds to warrant issuance of a preliminary injunction." On August 9, 1957, Judge Win G. Knoch of the District Court entered a "Memorandum and Order" as follows:

> "This matter came on to be heard on plaintiff's motion for oral hearing and the taking of testimony in support of his motion for preliminary injunction.
>
> "The Court has had the benefit of argument of counsel on briefs, and is fully advised in the premises.

"Scrutiny of all the pleadings, in the light of the arguments, fails to disclose allegations which, although viewed in the light most favorable to plaintiff, are sufficient to warrant issuance of a preliminary injunction.

"It appears unnecessary to set this matter for oral hearing and the introduction of testimony in support of the allegations which, if proved, set out no claim on which the relief sought could be granted.

"It is the order of this Court that motion for oral hearing be, and it is hereby, denied.

"It is further ordered that motion for preliminary injunction be, and it is hereby, denied."

From this order of August 9, plaintiff appealed to this Court, with particular emphasis on that part of the order which denied plaintiff the right to offer testimony in support of his motion. In connection with his appeal, plaintiff has filed in this Court a record of the proceedings in the District Court. No appendix or brief has been filed in support of the appeal.

Plaintiff, on October 14, 1957, filed in this Court in connection with his appeal a motion entitled "Motion for hearing and for preliminary injunction or for a writ of mandamus and for other relief." The motion purports to be filed under Title 28 U.S.C.A. Sec. 1651, and Rule 62 (g) of the Federal Rules of Civil Procedure. The motion, so it states, is based upon three propositions, (1) the action of the District Court in denying without a hearing plaintiff's motion for a preliminary injunction; (2) the inability of plaintiff to secure a fair and full hearing before Judge Knoch, and (3) plaintiff's ability to demonstrate upon a hearing that he is suffering gross and irreparable injury, that defendant will suffer no injury and that plaintiff in all likelihood will be entitled to a judgment in his favor upon final hearing. The relief sought is (1) that the motion be set for argument, (2) that a date be set for hearing of oral testimony upon the motion for preliminary

injunction, and (3) that an order be entered directing Judge Knoch to expunge his order of August 9, 1957, and to transfer the cause for reassignment to the Executive Committee of the District Court for hearing on plaintiff's motion for a preliminary injunction. After submission of briefs by the respective parties, the instant motion was set for hearing and argued orally before this Court. In the view we hold, we need not be concerned with our authority to grant the relief sought. This is so for the reason that the heart of the controversy engendered by the instant motion relates to the order of the District Court entered August 9, 1957, denying plaintiff's motion for a preliminary injunction, which is also the same order from which plaintiff has appealed. If that order was properly entered, all other issues fall by the wayside.

Plaintiff's main grievance appears to be that the District Court erred in its refusal to hear testimony in support of his motion and in its failure to make findings of fact in conformity with Rule 52 (a) of the Federal Rules of Civil Procedure. No cases need be cited for the proposition that ordinarily parties are entitled, on a motion for preliminary injunction, to offer testimony in support of their respective positions. This ordinary rule, however, is without application here because the Court (see its memorandum above quoted) concluded as a matter of law that plaintiff's allegations, even if proven, were insufficient to warrant the issuance of an injunction. With this conclusion we agree. The hearing of testimony in support of an insufficient allegation would be no more than an idle and useless ceremony. There is no rule and no case, so far as we are aware, which requires the hearing of testimony under such circumstances. While plaintiff alleges that failure to issue a preliminary injunction will result in irreparable damages to him, his motion and complaint

demonstrate to the contrary. It is indeed a novel theory that in an action for the recovery of damages the right to which is controverted by defendant, a preliminary injunction should issue to require a defendant to make payments in advance of a determination of the case on its merits. Plaintiff attempts to escape this dilemma by arguing that defendant's service annuity plan contemplates payments to a retired employee during his lifetime, and that a failure to so pay constitutes irreparable damages because the former employee might die before his rights were determined on the merits. The argument, if accepted, could be utilized in every action brought for the recovery of damages or a money award. We think it is without merit. Moreover, there is no showing that a preliminary injunction was necessary to preserve the status quo; in fact, its issuance would produce the opposite result.

This Court, in *In re South State Street Bldg. Corporation*, 140 F. 2d 363, sustained the action of the District Court in denying a request for a temporary injunction and in doing so made the following pertinent statement (page 366):

> "• • • For aught that appears in the complaint, the relief that the appellant sought and claimed to be entitled to could have been granted on final hearings, without irreparable damage to her. The failure to allege facts constituting irreparable injury was of itself justification for denying the temporary injunction. [Citing cases.]
>
> "• • • The denial of a motion for a temporary injunction, based upon a verified complaint alone, was certainly no abuse of discretion, where the complaint did not state a cause of action or any facts showing irreparable injury. [Citing cases.]"

Concluding as we do that the order of August 9, 1957, denying plaintiff's motion for preliminary injunction, was proper and that the Court did not err in refusing to hear

testimony in its support, we see no reason to discuss other points argued by plaintiff. Even so, we perhaps should mention plaintiff's criticism directed at Judge Knoch. We think it is without merit. We are not aware of any authority possessed by this Court on the record before us to direct that the cause be transferred to the Executive Committee of the District Court for reassignment. Furthermore, if we had the authority, we would not do so under the circumstances shown.

The relief sought by the instant motion is denied. In view of what we have held, there appears to be no other question for decision in plaintiff's appeal from the order of August 9, 1957, denying plaintiff's motion for preliminary injunction. The order appealed from is, therefore, affirmed. Costs in connection with both the appeal and the instant motion will be taxed against plaintiff.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT

For The Northern District of Illinois
Eastern Division

JOHN B. SCHLOSSER,

Plaintiff,

vs.

COMMONWEALTH EDISON COMPANY, ET AL.,

Defendants.

No. 57 C 785

MEMORANDUM AND ORDER.

This matter came on to be heard on plaintiff's motion for oral hearing and the taking of testimony in support of his motion for preliminary injunction.

The Court has had the benefit of argument of counsel on briefs, and is fully advised in the premises.

Scrutiny of all the pleadings, in the light of the arguments, fails to disclose allegations which, although viewed in the light most favorable to plaintiff, are sufficient to warrant issuance of a preliminary injunction.

It appears unnecessary to set this matter for oral hearing and the introduction of testimony in support of allegations which, if proved, set out no claim on which the relief sought could be granted.

It is the order of this Court that motion for oral hearing be, and it is hereby, denied.

It is further ordered that motion for preliminary injunction be, and it is hereby, denied.

Win G. Knoch
United States District Judge

Date: August 9, 1957

APPENDIX C.

Rule 15 (a), Rules of Civil Procedure for the United States District Courts, is as follows:

> (a) AMENDMENTS. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Rule 52 (a), Rules of Civil Procedure for the United States District Courts, is as follows:

> (a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. * * *

Rule 62 (g), Rules of Civil Procedure for the United States District Courts, is as follows:

> (g) Power of Appellate Court Not Limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D., 1957.

No. 973

JOHN B. SCHLOSSER,

Petitioner,

vs.

COMMONWEALTH EDISON COMPANY, WILLIS GALE, JOHN W. EVERS, JR., SOLOMON A. SMITH and H. P. SEDWICK,

Respondents.

PETITIONER'S REPLY BRIEF.

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IN THE

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OCTOBER TERM, A.D., 1957.

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COMMONWEALTH EDISON COMPANY, WILLIS GALE, JOHN W. EVERS, JR., SOLOMON A. SMITH and H. P. SEDWICK,

Respondents.

PETITIONER'S REPLY BRIEF.

General Statement:

Though petitioner's reply brief will be devoted principally to the correction of erroneous statements believed to be of a material character in respondents' brief, a short discussion will follow of petitioner's claim that the Court of Appeals sanctioned a serious departure by the trial court from the accepted course of judicial procedure requiring the exercise of this Court's power of supervision.

Respondents have brushed aside or lightly treated petitioner's claims that he has been denied a fair or prompt hearing in the trial Court. But the denial of petitioner's procedural rights were not lightly made by him. They are not of an inconsequential or isolated character. The following summary discloses that taken together they are of great substance and reach many vital phases of a litigant's rights at a trial.

1. June 10, 1957 Subpoena quashed as to items 5-7. (R. 42) Production of records relating to granting of annuities under pertinent provision of annuity plan denied.

2. June 10, 1957, July 30, 1957, August 9, 1957. Hearing on Motion for Preliminary Injunction refused.

3. July 30, 1957—August 9, 1957. Opportunity to present oral testimony on motion denied.

4. July 16, 1957 First series of interrogatories filed. (R. 84 ff) No answers filed by defendants to any of them —delay of 10 months to date. (See pp. 8-9 herein)

5. July 24, 1957 Amendments to Complaint as Amended filed—delay of 4½ months until defendants "voluntarily" withdrew objections on December 11, 1957.

6. September 10, 1957 Notice of Deposition of Dr. Lounsbury and two directors—delay to date over 8 months.

7. September 11, 1957 Second Interrogatories filed—7 in number, delay of over 8 months to date.

8. September 13, 1957 Defendants presented and Court approved demand of defendants to stay all discovery—delay of 8 months since filing of plaintiff's objections to Court order.

9. December 11, 1957 plaintiff denied permission to file Motion to assess costs against defendants for dilatory action with respect to amendments filed July 24, 1957.

Surely the above incidents go to the root of petitioner's rights to a fair and prompt trial. He had no hearing under respondents' annuity plan and was unaware until two years after retirement of the basis of respondents' action. The primary purpose of the annuity plan was to pay an annuity during the remaining lifetime of a former employee. Undue delay here is irreparable injury.

But the charges of unfair treatment, and bias made by petitioner in the Court of Appeals were also predicted upon the knowledge of petitioner's counsel that the trial judge (Knoch) in two other suits(1) involving major utilities with but one exception apparently granted plaintiffs only those procedural rights voluntarily conceded by defendants. This identical but regrettable pattern was followed in this suit and surely represents a serious departure from the accepted and usual course of judicial procedure.

Respondents' Misstatements.

1. Respondents stated, pg. 4, that:

"On that date, (July 30, 1957) Judge Knoch stated that on the basis of the complaint and answer it was his opinion that the motion for preliminary injunction should be denied (R. 100-102). *He gave petition-*

---

(1) *Williams* v. *Western Electric Co., et al.* No. 55 C 472. U. S. Dist. Court, No. Dt. Ill. E.D. This was also a suit by an employee for a service annuity. After the Court refused to allow an appeal under 28 US C 1915 plaintiff accepted a nominal settlement. In *Weinhaus* v. *Gale, et al* affirmed 237 F 2d 197 the trial judge allowed a one sentence amendment over objections of defendants. This is believed to be the only instance in the three cases where a plaintiff was allowed procedural rights by this trial judge not objected to by defendants with possible minor exceptions. The trial judge disposed of defendants' motion to dismiss it 3 days after argument in the *Williams* case and in 2 days in the *Weinhaus* case.

er an opportunity, however, to submit a memorandum on the question (R. 96 and 102)." (Italics added)

This statement is incorrect. The Court plainly allowed but 3 days for the filing of a brief as to whether plaintiff was entitled to a hearing on his motion for preliminary injunction. This privilege was accorded him only after the Court denied the motion on the merits and refused to set the motion for any hearing though he had this question under advisement for over two months. The order of the Court (R. 96) in part follows:

> Ordered that leave be and it hereby is given to the plaintiff to file brief on or before August 2, 1957 *in support of his motion to set this cause for hearing on his motion for a preliminary injunction* • • •" (Italics added)

Is this accepted and usual course of judicial procedure? We think not. Nor is it a matter of inconsequence.

2. The statement by respondents (pg. 3) that

> "respondents furnished to counsel for the petitioner copies of most of the documents sought including the whole of the company file as to petitioner • • • On June 10, 1957 the district court quashed the subpoena duces tecum with respect to the remaining items sought (R. 42)."

The first statement is incorrect. The principal documents sought in the subpoena were records relating to the granting of service annuities under the controversial third paragraph of Sec. 4 including the construction by the defendants of this paragraph. Items 5-7 subpoena was refused by defendants then and throughout the case and sustained by the trial court. Respondents voluntarily made available part of their file relating to petitioner's record and historical changes in the annuity plan, but have persistently refused to produce any records disclosing the meaning of the terms:

"Any employee who shall not have attained the age of 65 while in service may * * * be retired, *on account of permanent disability or for any other reason.* * * *"

The crucial parts of the subpoena quashed were (R. 25, 42):

"5. All minutes, memoranda, correspondence, decisions, of any kind whatsoever of the benefit committee relating to the granting or denial of any Service Annuity under the third paragraph of Sec. 4 of the Service Annuity System during the period (a) January 1, 1954 to September 30, 1954 inclusive, (b) January 1, 1952 to December 31, 1953 inclusive and (c) October 1, 1954 to December 31, 1955."

6. (Same as 5 except minutes of directors were requested).

"7. All documents, memos, letters, correspondence of any kind involving the construction of the third paragraph of Sec. 4 of the Company Service Annuity System in effect on September 30, 1954."

It is these records which petitioner endeavored to secure since May, 1957 by subpoena and other discovery measures and has so far been denied. Without them he cannot try his case or answer the motion for summary judgment and he has been granted nothing on this issue as on any other not voluntarily conceded by defendants.

3. The respondents' statement (p. 5) that:

"On September 12, 1957, respondents filed a Motion for summary judgment supported by more than one hundred (100) pages of detailed factual information with respect to the petitioner and his claim, *all of which, contrary to petitioner's assertion (Petition p. 13) were set forth under oath.*"

This statement is incorrect, we believe. The motion consists of five affidavits and 30 exhibits. These exhibits were largely prepared by persons other than affiants.

The five affiants could not swear to nor did they as to the truth of alleged material facts for which others were

primarily responsible. Petitioner on September 23, 1957 filed his memo advising the trial Court it was necessary to proceed with discovery as to much of such unsworn data and other records.

In his objections to defendants' Motion to Stay Discovery, petitioner said in part:

> c. "Plaintiff requires the completion of the pending discovery in order to secure necessary facts for the purpose of contesting the untrue statements contained in the affidavits and exhibits attached to defendants' motion for summary judgment. • • •
>
> d. "The examination of affiant Baxter is necessary under the discovery rules of this Court with respect to par. 14-18 inclusive of his affidavit, of C. E. Parker with respect to all phases of his affidavit, of Exhibit 10 for the purpose of enabling plaintiff to secure access to the files in the material of the three offices shown therein; of H. W. Christy for the purpose of examining him upon his medical qualifications and medical terms and conclusions, and exhibits 11, 12, 16, 17 and 18 and for R. B. Gear on his affidavit and Exhibits 20-24 inclusive.
>
> e. "The aforesaid affidavits and exhibits reveal that numerous other employees of the defendants have vital information relating to the issues raised by defendants' motion and many of such persons will have to be examined by plaintiff under the discovery rules. Such persons are identifiable only by initials in some cases such as EWG, WAJ, MT, SLT, (Ex. 18), W. L. Marks, E. E. Patton, etc. (Ex. 22), Auringer, Denager, Marks, Leister or Huston (Ex. 23), Ray Kruse • • • (Ex. 24).
>
> j. "The deposition of Lounsbury, the defendants' medical director, should be taken in view of the importance of his determination, the responsibility of his position and the complex and untrue character of his conclusions. • • •"

It is indeed strange that defendants should still insist on the completely sworn character of their motion, affi-

davits and exhibits. In his affidavit R. B. Gear states that Schlosser's duties involved "purchase of equipment for major construction projects * * * possibility of speeding construction to meet the company's construction program * * * to visit vendor's factories and shops. * * *" President J. W. Evers, and head of respondents' Annuity Committee in the only deposition taken in the case, contradicts this statement for he said (pg. 22) Schlosser's functions did not "include machinery or equipment" but "furniture and supplies".

And Evers also stated under oath (pg. 23) that he first knew of the Schlosser matter in 1956, two years after Edison refused him a pension but Exhibit 22 attached to defendants' motion, contains this note; "OK'd by Mr. Evers 9/22/54." It is this exhibit in which Gear states that if Schlosser "does not report for work in one week from that date, we will consider that he has resigned".

It is thus clear why respondents desire to block further discovery by petitioner. Petitioner wonders what ruling might have been made by an informed and impartial annuity committee on his application after a fair hearing.

4. The statement that (pg. 5):

> "The Court ordered petitioner to answer the motion for summary judgment and motion to stay all discovery proceedings within ten days, took the motions under advisement, and further ordered that the depositions scheduled for September 16, 1957 be held in abeyance."

When the defendants presented their motion for summary judgment, they failed to comply with the trial court rule requiring that it be supported by a brief. (Rule 13) Plaintiff stated he could not answer the motion for a summary judgment until the Court determined whether he could first have discovery on factual issues raised by defendants' motion. It was this, and this alone, that he

was allowed ten days to file a memo on and this he did. It is unbelievable that the trial Court would allow him only ten days to file answers to a motion for a summary judgment of over 100 pages. Defendants did not then request such an order.

5. Respondent's statement (p. 7) that the District Judge "heard arguments and considered briefs on the sufficiency of Petitioner's claims" has already been shown to be incorrect.

The July 24, 1957 Interrogatories. (R. 84 ff)

Since the record was not printed we reproduce some of the original 38 interrogatories all of which defendants objected to. Among such interrogatories are the following:

"3. What rules other than the Plan itself had been issued since he was employed which govern in any way their administration of the Plan, and (1) list all such rules or regulations; (2) attach copies or (3) make them available.

4. Are all the Edison and affiliated company letters and documents relating to the employment and retirement from employment including his medical history file in full, the documents, etc., which Mr. Cronin made available for examination to counsel for the plaintiff on Friday, June 7, 1957. If there are any others in the file of the company, please list them by description and dates.

5. (a) Has the company at any time in any published document prior to the retirement of Mr. Schlosser, advised its employees that:

> "In 1954 as at present, a person is entitled to disability retirement only by virtue of competent doctors stating that an employee is unable to perform any services."

(b) If the answer is yes, list all documents published by Edison during the employment of the plaintiff which announced that the above statement represented Edison policy.

(c) When did it first so advise the plaintiff.

7. Is Edison able to state that at no time between the employment of the plaintiff on June 11, 1925 and October 3, 1956, the date of the Parker letter, that no person was ever given a disability annuity under the annuity plan if (unless) "competent doctors (stated) that an employee is unable to perform any services."

8. If the answer is in the negative, state the exceptions.

9. If the answer is in the affirmative, state upon what authority the answer is given.

13. What does the term "permanent disability" mean as defined in the plan.

14. List all documents, statements and correspondence of any kind where the term has been defined or construed by Edison. Will you supply copies of such documents or make them available for plaintiff's examination.

15. What regulations, if any, have been issued defining the term, "permanent disability". Will you supply copies of such documents or make them available for plaintiff's examination.

16. What regulations, if any, have been issued defining the term "for any other reasons". Will you supply copies of such documents or make them available for plaintiff's examination.

19. List the illnesses which are considered in determining the granting of the service annuities within the terms "permanent disability".

20. Is heart disease one of such elements.

21. What type of heart disease is considered as qualifying a person for a service annuity under this proviso.

30. Name the physician who determined the standards of "permanent disability", in Section 4 of the Annuity Plan.

34. What methods did the defendant employ to notify its employees, including the plaintiff, of the terms and conditions under which (a) service annuities generally were made available to them or (b) service annuities under the 3rd paragraph of Section 4."

Conclusion.

Petitioner has been denied a fair and prompt hearing in the trial court. The Court of Appeals sanctioned a vital departure from the accepted and usual course of judicial procedure. This court should therefore grant this Petition.

Respectfully submitted,

HARRY R. BOOTH,

Attorney for Petitioner.

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MAY 26 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D., 1957.

No. 973

JOHN B. SCHLOSSER,

Petitioner,

vs.

COMMONWEALTH EDISON COMPANY, WILLIS GALE, JOHN W. EVERS, JR., SOLOMON A. SMITH and H. P. SEDWICK,

Respondents.

Brief Of Respondents In Opposition To Petition For Certiorari.

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Respondents.

Brief Of Respondents In Opposition To Petition For Certiorari.

The respondents respectfully urge this Court to deny the petition of John B. Schlosser for a writ of certiorari.

JURISDICTION.

The jurisdiction of the district court was invoked under 28 U.S.C. § 1332 (a) (1). The jurisdiction of this Court was invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED.

Did the Court of Appeals sanction such a departure by the District Court from the accepted and usual course of judicial procedure as to require an exercise of this Court's power of supervision?

STATEMENT.

On September 30, 1954, petitioner, voluntarily resigned from the employ of the corporate respondent after 29 years of service. Nearly two years later, at the age of 54, on September 7, 1956, he applied to the company for a service annuity (R. 79). On October 3, 1956, petitioner was informed that under the non-contributory pension plan of the company an employee was entitled to a disability retirement only after competent doctors stated that he was unable to perform any services, and that since this was not true in his case, he was not entitled to an annuity (R. 14).

Petitioner filed this action on April 30, 1957, asserting that he was entitled to a service annuity of not less than One Hundred Thirty-Seven and 77/100 Dollars ($137.77) per month from September 30, 1954, to April 30, 1957, and asking a judgment for not less than Four Thousand Two Hundred Seventy and 95/100 Dollars ($4,270.95), with interest; plus a judgment for such additional amount at the same rate as might become due between May 1, 1957, and the date of judgment; and an order on respondents to pay petitioner not less than One Hundred Thirty-Seven and 77/100 Dollars ($137.77) per month after the date of judgment for petitioner's lifetime.

On May 10, 1957, petitioner filed amendments to his complaint adding a second count purporting to be a class action seeking a construction, modification and alteration of the company's service annuity plan.

Petitioner demanded a trial by jury.

On May 21, 1957, petitioner served notice that he would seek a preliminary injunction compelling payment of the claimed annuity beginning at once. He also served a *subpoena duces tecum* on the secretary of the company returnable on May 24, 1957, demanding production of a quantity of books and records (R. 25).

The respondents promptly moved to quash the *subpoena duces tecum* (R. 24). Nevertheless respondents furnished to counsel for the petitioner copies of most of the documents sought, including the whole of the company file as to petitioner, and promised to furnish him additional material (R. 44-45). On June 10, 1957, the district court quashed the *subpoena duces tecum* with respect to the remaining items sought (R. 42).

On June 13, 1957, respondents filed their answer to the complaint as amended denying any liability to the petitioner and asserting that the complaint did not state a cause of action.

On June 17, 1957, respondents filed an answer to the motion for preliminary injunction incorporating their answer to the complaint, asserting that the petitioner did not set forth sufficient grounds to warrant issuance of a preliminary injunction, and denying the bulk of the allegations contained in the motion for preliminary injunction (R. 81).

Though not shown by the record since they were never filed by petitioner, on June 26, 1957, he served a notice and motion on counsel for respondents asking the court to strike that answer, to fix an immediate date for hear-

ing on petitioner's motion for preliminary injunction and to assess against respondents legal fees "due to defendant's dilatory tactics". After serving the notice of motion counsel for petitioner advised counsel for respondents orally that the motion would not be presented, and it was not presented to the court. Again on July 15, 1957, another motion and notice were served on counsel for respondents asking that the company be held in contempt for alleged failure to produce certain books and records covered by the *subpoena duces tecum* and to require the company to pay attorney's fees to petitioner's counsel. As before this motion was not presented to the court on the date set in the notice.

Instead, on July 23, 1957, counsel for respondents were again served with a notice of motion to be presented on July 24, 1957, incorporating by reference the motion served on July 15, 1957, seeking to have the company held in contempt, and including a motion for leave further to amend the complaint, and another motion to have the motion for preliminary injunction set for hearing. Judge Knoch to whom the matter had been assigned was not sitting at that time, so that the motions were entered and continued to July 30, 1957. On that date Judge Knoch stated that on the basis of the complaint and answer it was his opinion that the motion for preliminary injunction should be denied (R. 100-102). He gave petitioner an opportunity, however, to submit a memorandum on the question (R. 96 and 102). At the same time he directed the parties to file briefs with respect to the matter of the proposed amendments to the complaint, and denied petitioner's motion to hold the company in contempt.

On August 1, 1957, petitioner filed his memorandum and on August 2, 1957, respondents filed a memorandum in answer thereto. On August 9, 1957, the district court

filed a memorandum and entered an order denying the motion for preliminary injunction (R. 116).

On the same day respondents filed their memorandum in support of their opposition to the proposed amendments to the complaint and their objections to the interrogatories which had been filed and on August 20, 1957, petitioner filed a brief with respect to the same matters.

On August 28, 1957, petitioner filed a notice of appeal from the order of August 9, 1957.

On August 29, 1957, petitioner served additional interrogatories. On September 7, 1957, petitioner served notice that he desired to take the depositions of an employee of the company and two of its directors on September 16, 1957. On September 10, 1957, respondents filed objections to the additional interrogatories. On September 12, 1957, respondents filed a motion for summary judgment asserting that there was no substantial issue of fact involved here supported by more than one hundred (100) pages of detailed factual information with respect to the petitioner and his claim, all of which, contrary to petitioner's assertion (Petition p. 13) were set forth under oath. On the next day respondents presented a motion asking the court to compel the petitioner to answer the motion for summary judgment and further asking the court to stay discovery pending disposition of the motion for summary judgment on the ground that since there was no substantial issue of fact involved here further discovery proceedings were unnecessary. The court ordered petitioner to answer the motion for summary judgment and motion to stay all discovery proceedings within ten days, took the motions under advisement, and further ordered that the depositions scheduled for September 16, 1957, be held in abeyance. On September 24, 1957, the petitioner filed

an answer to the motion to stay discovery but he has filed no answer to the motion for summary judgment to the present time.

Meanwhile petitioner proceeded in much the same fashion in the Court of Appeals. He filed a designation of record on September 16, 1957, and the clerk of the district court filed the transcript of record on September 30, 1957. Instead of filing the appendix and brief as required by the rules of the Court of Appeals for the Seventh Circuit, the petitioner, on October 14, 1957, filed with the Court of Appeals a motion which he titled "Motion for Hearing and for Preliminary Injunction or for a Writ of Mandamus and for other Relief" and a brief in support. We have filed herewith a certified copy of the answer of the respondents and the brief in support thereof filed in the Court of Appeals.

After hearing oral argument on this motion the Court of Appeals denied the motion and dismissed the appeal, *Schlosser* v. *Commonwealth Edison Co.*, 250 F. 2d 478. It is this action which this Court is now asked to review.

On December 11, 1957, before the opinion of the Court of Appeals was rendered, respondents asked and were granted leave to withdraw their objections to petitioner's second set of amendments to his complaint. On the same day respondents filed their answer to the complaint as amended.

Shortly after the mandate of the Court of Appeals was filed and the record was returned to the district court, the Executive Committee of that court reassigned this cause to Judge Miner who was recently appointed to that bench. On March 27, 1958, on the preliminary call of all matters assigned to him, he set for hearing on June 9, 1958, the matter of interrogatories and a rule on petitioner to answer respondents' motion for summary judgment.

REASONS FOR DENYING THE WRIT.

Petitioner sought by preliminary injunction to require respondents, who deny any obligation, to pay him before the question of liability could be determined. He cites no authority for this and cannot. No matter how petitioner beclouds and seeks to confuse the issue, this case involves no more than that as the Court of Appeals decided.

None of the cases cited by petitioner require exercise of this court's supervisory power under the circumstances here. Grant or denial of a preliminary injunction is a matter within the discretion of the trial judge. *Meccano, Ltd.* v. *John Wanamaker, New York*, 253 U.S. 136 (1920). No abuse of that discretion is shown here. Indeed, since neither petitioner's complaint nor his motion contained any allegations of irreparable harm which would be done him while the trial court determined the issue of liability, denial of the motion was the only proper course. *In re South State Street Bldg. Corporation*, 140 F. 2d 363, 366 (1943).

Both the district judge and the Court of Appeals heard arguments and considered briefs on the sufficiency of petitioner's claims. This was all the hearing to which he was entitled under the ordinary judicial processes. See *Gibbs* v. *Buck*, 307 U.S. 66, 76 (1939).

Certainly the doctrine of *LaBuy* v. *Howes Leather Company*, 352 U.S. 249 (1957) has no application here. There the reference to a master, in any event, was not the general practice. Here, the denial of a temporary injunction to compel payment of money by defendants who deny liability is itself the general rule.

CONCLUSION.

Because of petitioner's anomalous procedure below, the record in this Court is scant. We have filed herewith a certified copy of the docket of the clerk of the district court to support our Statement of the case. We respectfully submit that denial of the writ of certiorari will aid both the district court and counsel who are endeavoring to dispose of this matter in accordance with established judicial procedures.

Respectfully submitted,

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